

of the Commission's rules, an order disposing of petitions for reconsideration that reverses or modifies a previous ruling is itself subject to a new request for reconsideration. ARBA seeks reconsideration or clarification with respect to an element of the new comparative standards for noncommercial applicants that was only first elaborated by the Commission in the Second Reconsideration Order.

In its April 18, 2001 Petition for Reconsideration, ARBA (then, ARN) expressed concerns that noncommercial applicants could earn the three points of comparative credit for being an "established local applicant" merely by existing as a shell corporation for two years prior to the look-back date (whether the filing date, or the June 4, 2001 snap-shot date). Prior decisions in this proceeding created the definition of "established local applicant" in §73.7000 of the rules:

Established local applicant. An applicant that has, for at least the two years (24 months) immediately preceding application, met the definition of local applicant.

Local applicant. An applicant physically headquartered, having a campus, or having 75% of board members residing within 25 miles of the reference coordinates for the community to be served.

A fair reading of the rule seems to indicate that an applicant merely needs to have a corporate existence for two years prior to the application in order to qualify for the credit. But the Commission said in the Second Reconsideration Order that "It has never been our intent to award the established local applicant credit to organizations engaged in virtually no activities in the community of interest." *Second Reconsideration Order*, at ¶15. The Commission cited instances in the previous orders in this proceeding where it indicated its expectation that an applicant qualifying for this credit would have experienced "contact" with the area, would have

“continuing” “interaction” with the community, and would have already “become such a part of the community” as to have the knowledge and accountability to “hit the ground running.”

These generalities were never explained with specificity, however, until ¶16 in the Second Reconsideration Order. There, the Commission listed examples of specific activities in which an applicant might participate to gain the desired local experience to really be deserving of “established local applicant” credit. As illustrative examples, the Commission mentioned convening meetings with the community, teaching classes on a local campus, undertaking community programs, generating income and/or expenses from a community-based asset, or engaging in active planning of the prospective program schedule. Such activities undertaken by the applicant would rightfully allow it to claim the “established local applicant” credit. This is the first time that the Commission has fleshed out what that could mean.

However, ARBA remains concerned about how such behavior by an applicant can be tested, or even detected, by opponents or interested local residents. The Commission said that “our existing petition to deny process would provide a meaningful opportunity to show that a purportedly ‘established’ applicant was only a ‘paper’ organization.” *Ibid.* But how? A petitioner would be required to prove a negative with the potential prospect of very little information about a quiet applicant. It may be relatively easy for a petitioner to demonstrate bad applicant behavior that would disqualify the applicant. However, it may be extremely difficult to make an adequate prima facie showing (as a petitioner is required to do) that an otherwise acceptable applicant has *not* been participating in desirable behavior. An applicant could very well be conducting meaningful legitimate activities that would earn it the local credit without

being detected by potential petitioners. Other equally unobtrusive applicants might be doing nothing. The interested potential petitioner would have no way to distinguish between the two.

ARBA believes that the solution to this problem would be to require an applicant claiming the “established local applicant” credit to identify on its Form 340 application the specific activities it has conducted during the previous two years that form the basis for its claim.

The Form 340 as currently designed does not elicit this information. Applicants are merely asked to state whether or not they claim the credit. Worksheet #4 associated with the Form 340 is intended to assist the applicant making its calculation of claimed credit. However, the Worksheet does not elicit such basic information either. The presence of such concise and objective information about the applicant’s claim in its application would serve to assist the Commission, competitors and the public in a proper and thorough evaluation of the applicant. Without such disclosures by the applicant in its application, there is no effective method for policing the validity of its claim to the local credit as envisioned by the Commission. Without this initial statement of an applicant’s basis for making the claim, the petition to deny process is toothless.

In the Second Reconsideration Order, the Commission enunciated for the first time the detailed involvement in community activities that it expects of those who claim the “established local applicant” credit. ARBA supports the underlying philosophy that applicants claiming to be local should be local in fact. The Commission has not completed the task of inserting these objective criteria into the comparative evaluation process. Applicants should be required to disclose such facts about themselves from the beginning of the process in their applications.

ARBA urges the Commission to modify the Form 340 and the accompanying worksheets so that such information can be elicited from applicants.

Respectfully submitted,

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